HASSAN BIN SEMAN & ORS. v. JUSOH BIN AWANG CHIK

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & July 30, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 207 of 1979]

Land Law — Transfer of half-share in land — Memorial on register of title that whole of land transferred — Error — Power of Court to order rectification — Inquiry under Kelantan Land Settlement Ordinance, 1955 — Appeal heard by District Officer — Application to High Court — Kelantan Land Settlement Ordinance, 1955, ss. 5, 10 & 16 — National Land Code, s. 417(1).

In this case the appellant appealed against an order made by the learned judge of the High Court for a declaration that a piece of land belonged to the respondent and his late brother. The land originally belonged to one Awang bin Salleh but was transferred to one Awang Kechik, the father of the respondent. According to the memorial on the register of title, the whole of the land was transferred to Awang Kechik. The appellants on the other hand claimed that Awang bin Salleh only sold a half-share in the land to Awang Kechik and that the remaining half share on the death of Awang bin Salleh devolved to him and his sister. An inquiry had been held under section 5 of the Kelantan Land Settlement Ordinance, 1955 and on appeal the District Officer found that Awang bin Salleh only transferred a half-share in the land to Awang Kechik. The District Officer however took no steps to rectify the mistake in the memorial to the register of title. The respondent applied to the High Court for a declaration and the learned judge of the High Court gave judgment in favour of the respondent. Although he accepted that the memorial was a mistake he held that the respondent's title was indefeasible, unless and until it was rectified. The appellant appealed.

Held: (1) the court has power to order correction of the error under section 417 of the National Land Code;

(2) in this case as the respondent claimed superior title, he could institute a fresh action to challenge the order of the District Officer instead of pursuing the matter by way of appeal;

(3) an order should be made that only a half share of the land was sold and that the Registrar of Titles should make the necessary corrections on the register of title to accord with the memorandum of transfer.

Cases referred to:-

(1) *Sungei Biak Tin Mines Ltd.* v. *Saw Choo Theng & Anor. (No. 2)* [1970] 2 M.L.J. 226, 227.

(2) *Deraman & Ors.* v. *Mek Yam* [1977] 1 M.L.J. 52.

(3) *Som binti Daud & Ors.* v. *Nik Mustaffa bin Nik Idris & Ors.* [1978] 1 M.L.J. 13.

(4) *Mek binti Idris* v. *Nor bin Awang* [1978] 2 M.L.J. 257.

FEDERAL COURT.

S.E. Rajah for the appellant.

Datuk Wan Mustapha for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal from the decision of Datuk Mohamed Zahir J. granting a declaration to the respondent/plaintiff to the effect that he is the owner of half share in a piece of padi land Lot 576 held under EMR 569 of Mukim Tualang, Bachok and that the other half share belongs to his late brother, Deraman.

The suit of the respondent in respect of which the declaration was given is a claim for superior title based on the register of title to the land which contains a memorial to the effect that the first owner of the land, Awang bin Salleh (herein referred to as "Awang") on January 16, 1929 transferred his whole share in it to a purchaser, named Awang Kechik bin Seman (herein referred to as "Awang Kechik"). The respondent is a son of Awang Kechik. It is the case of the respondent that upon the death of his father the land was transmitted to him and his late brother Draman bin Awang. Such transmission was recorded in the register of title as Pr. 303/1952 Trans. 139/1952 on March 31, 1952 by virtue of a small estate distribution order.

The appellants, on the other hand, claimed that Awang, who was the father of appellant No. (1) and grandfather of appellants Nos. 2 and 3 only sold half share in the land to Awang Kechik and that the remaining half-share, upon the death of Awang, was transmitted to appellant No. (1) and his late sister, Limah bt. Awang, through whom appellants No. (2) and (3) claimed their shares.

Before the suit was instituted this land was the subject-matter of an inquiry by an Inquiry Officer under section 5 of the Kelantan Land Settlement Ordinance, 1955, and subsequently an appeal was heard by the District Officer under section 16 of the Ordinance. The finding of the District Officer made in respect of the appeal was that according to the same Memorandum of Transfer Pr. 1791/27 Tf 1044/27 of which its memorial was recorded on the register of title Awang only transferred half-share in the land to Awang Kechik. Therefore Awang's name should still remain in the register as owner of the other half-share. There was no evidence or even a suggestion that there was a fraud as regards the memorandum or the memorial, and so the District Officer held that the discrepancy between the memorial and the memorandum was a mere technical mistake.

In the trial before the learned judge the appellants did not call any witness but relied entirely upon the records of the proceedings before the District Officer, which records contain the evidence of the appellants, the respondents and other witnesses. It is the appellant's case therefore that the memorial on the register of title which says that Awang Kechik was the owner of the whole share is a technical mistake and cannot stand in view of the fact that the memorandum of transfer, upon which the memorial depends, says otherwise.

In the appeal under the Kelantan Land Settlement Ordinance, the District Officer, despite his finding that the relevant memorial was a technical mistake, took no step to cause its rectification. He was merely content to express this finding and did nothing else. However he made an order of possessory titles on the basis of possession found by him. In the trial before the learned judge, a ruling was made that a District Officer holding an inquiry or an appeal under the Ordinance has no power to order a correction of such mistake as the one in this case. Counsel for the appellants therefore submitted to us that this ruling was erroneous. For ourselves we do not think that it is necessary to express our opinion upon the ruling or the submission because the District Officer made no such order. The question does not arise at all. Thus whatever ruling expressed in the judgment must therefore be a mere *obiter*.

In the court below although the learned judge appears to have accepted the relevant memorial as a mistake, like the District Officer, he made no order to rectify it, but proceeded to give judgment in favour of the respondent. The ground of decision seems to be the indefeasibility of the respondent's title under section 340 of the National Land Code, despite an error having been found on it. In his judgment the learned judge states: —

"I have to recognise the existing title of the plaintiff (respondent) unless and until it is rectified under due process of the law. As the plaintiff's (respondent's) title is indefeasible under section 340 of the National Land Code, I ordered that...."

We are of the view that indefeasibility is not affected, when the correction only relates to a mere technical mistake. As has been stated earlier there was neither evidence, nor even a suggestion that the discrepancy between the memorandum of transfer and its memorial on the register was a fraud, it must therefore be a genuine mistake which can be corrected by the Registrar of Title as "an error or omission" within the meaning of section 380(1)(c) of the National Land Code. In this case indefeasibility is irrelevant and not at all impugned because the rightful entitlement of Awang Kechik was not to the whole land, but only to half-share in it. The correction of error, if ordered, is only for the purpose of bringing the title in line with his rightful share as disclosed in the memorandum. In no sense this correction is to be regarded as a diminution of his share. That Awang transferred only half-share is also confirmed by the finding of the District Officer of the uninterrupted possession of one portion of the land by appellant No. (1) and another portion by appellants Nos. 2 and 3 over a long period of time. It is only the third portion of the land that came under the control of the respondent and the children of his late brother; (defendants Nos. 4, 5, 6, 7 and 8 in the court below) and even this portion was let out to a tenant farmer, named Hassan bin Adam on a pawah (yield-sharing) system.

In view of all these factors, we feel that the court below should have acted under section 417 of the National Land Code. This section says: —

"417(1) The court or a judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith."

That the court has power to order correction of error under this section was clearly expressed by this court in *Sungei Biak Tin Mines Ltd.* v. *Saw Choo Theng & Anor. (No. 2).*[1] In the National Land Code indefeasibility and correction of error are two independent provisions existing side by side. Each has its own sphere and scope of operation. The provision for correction of error is not even treated by the Code as an exception to indefeasibility provision. Thus correction of an error can never be a violation of the indefeasibility principle, and must remain outside the scope of the indefeasibility principle. The only care the Registrar of Title or the court making an order for correction should take is to determine that the mistake is a mere error and that it does not cease to be so and does not become something else. In the present case we are satisfied, just as the District Officer was, that the memorial made on the register of title was an error and not something else. In the circumstances we consider it a proper case to order its correction.

Further the respondent's suit is based on claim for superior title. Yet his title cannot go beyond that of his father, Awang Kechik. The respondent was not a purchaser for value but only a volunteer who inherited from his father whatever share the latter had in the land. Similarly the appellants, too, are mere volunteers. Their claim is based on the title of Awang, whose name, but for the error, should remain on the register as the owner of the other half-share. Thus the respondent's title, in no sense, is higher or better than that of the appellants. In our judgment the respondent's suit should therefore fail.

In this case as stated earlier, the land was the subject-matter of an inquiry and an appeal under sections 5 and 6 of the Kelantan Land Settlement Ordinance. The case came before the High Court not by way of an appeal against the order of the District Officer as provided by section 16 of the Ordinance, but by way of a fresh suit. Counsel for the appellant submitted that because the respondent did not lodge a further appeal under section 16 his suit is not maintainable and that it should be dismissed. In our view this submission is not valid as this court has on two previous occasions already ruled that a person claiming superior title under section 10 of the Ordinance is not precluded from instituting a fresh suit to challenge the order of the District Officer instead of pursuing the matter by way of a further appeal under section 16 of the Ordinance (*vide Deraman & Ors.* v. *Mek Yam,*[2] *Som binti Daud & Ors.* v. *Nik Mustaffa bin Nik Idris & Ors.,*[3] *Mek binti Idris* v. *Nor bin Awang*[4]).

In view of the conclusion we reach in this appeal, we think it fair to both sides that an order be made on the basis that Awang sold only half-share of the land to Awang Kechik and that the Registrar of Titles do make the necessary corrections on the register of title to accord with the memorandum of transfer and subsequent corrections regarding the respondent's and his brother's entitlement. We also order that the possessory titles ordered by the District Officer under the Kelantan Land Settlement Ordinance are to be amended to reflect the corrections so that the respective shares of the persons interested in this land are as set out below: —

Respondent		10/40	i.e. ½ share of the whole land
Defendant	No. 4	2/40)	
Defendant	No. 5	2/40)	
Defendant	No. 6	2/40)	i.e. ½ share of the whole land
Defendant	No. 7	2/40)	
Defendant	No. 8	2/40)	
Appellant	No. 1	10/40	i.e. ½ share of the whole land
Appellant	No. 2	5/40)	
Appellant	No. 3	5/40)	i.e. ½ share of the whole land

This order more or less coincides with parties' respective possessions of the portions of the land as found by the District Officer. We hope that by this order this long and complicated land dispute between

the parties, who are closely related to one another should come to an end and that the parties and others involved should be prepared and minded to come back to terms with one another as they were once before.

The appeal is therefore allowed with costs and the deposit should be refunded to the appellants.

Appeal allowed.

Solicitors: *S.E. Rajah & Co.; Datuk Wan Mustapha & Co.*

PENGARAH PELAJARAN, WILAYAH PERSEKUTUAN & ORS. v. LOOT TING YEE

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 7 & September 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 177 of 1980]

Administrative Law — Declaration — Application to declare decision to transfer public officer inoperative and void — Application to strike out statement of claim — Public Officer holding office during pleasure of Yang di Pertuan Agong — Right to transfer public officer — Discretion of Minister — No proof of bad faith or malice.

Constitutional Law — Public Service — Public officer holding office during pleasure of Yang di Pertuan Agong — Transfer of public officer.

In this case the respondent had been told that he was transferred from a school in Kuala Lumpur to a school in Trengganu. He appealed to the Minister of Education, who confirmed the transfer. The respondent thereupon applied for a declaration that the transfer was inoperative and void. The appellants applied to have the statement of claim struck out on the ground that the issues raised in the statement of claim were non-justiciable and that they were otherwise scandalous, frivolous, vexatious and an abuse of the court's process. Vohrah J. dismissed the appellant's application. He held that the power of transferring an officer must be exercised by the transferring authority honestly, *bona fide* and reasonably and as the statement of claim contained allegations of bad faith the respondent's suit should proceed to trial. The appellants appealed.

Held: (1) as a civil servant holds office during pleasure, not only the length of his service is subject to pleasure but the place and time of his service is similarly subject to pleasure. The only difference is that as regards dismissal and reduction in rank procedural safeguards contained in Article 135 of the Federal Constitution must be observed whereas in cases of transfer and other matters no such safeguards need be followed;

(2) thus whether a civil servant should be transferred and if so where and when the transfer is to be made are matters for the Government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of *mala fide* and unreasonableness;

(3) as employment in the public service is during the pleasure of the Yang di Pertuan Agong, so long as a public officer is in the service, it is for the Government to decide whether his transfer is in the public interest or not having regard to the fact that the Government has a large public duty to perform. There was absolutely no legal basis for the court to interfere with the Government's discretion;

(4) there is nothing in the Constitution which entitles an officer to bring his grievances before the court whenever he is punished unless and until the punishment complained of amounts to a dismissal or reduction in rank. No matter how aggrieved an officer is by the punishment, he has no cause of action;

(5) No officer can claim to have a legal right of non-transferability because by joining the Government service he has become liable to transfer;

(6) there was nothing to show that the respondent had been reduced in rank by the transfer. Taking him away from a supervisory capacity is not a reduction in rank within the meaning of Article 135 of the Federal Constitution;

(7) there was no evidence to show that the respondent was transferred because of personal animosity. In this case it was clear that the decision was made by the Minister, who had genuinely considered the merits of transfer;

(8) even on the assumption that the allegations in the statement of claim were true, the respondent had no cause of action. In this case the statement of claim not only did not show any reasonable cause of action but it was also scandalous, frivolous, vexatious and an abuse of the process of the court.

Cases referred to:-

(1) *Partap Singh* v. *State of Punjab* A.I.R. 1964 S.C. 72.

(2) *Malinamani* v. *Commissioner Habli Dharwar Municipal Corporation* [1973] Kar. L.J. 121.

(3) *State of Bihar* v. *Abdul Majid* A.I.R. 1954 S.C. 245, 249.

(4) *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87, 104.

(5) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 2 M.L.J. 238.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) (*Miss Zaleha Zahari*, Federal Counsel, with him) for the appellant.

Karpal Singh (*S.T. Lim* with him) for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal from the decision of Mr. Justice Vohrah, refusing the appellant's application to strike out the respondent's claim.

The respondent was a school teacher attached to Sekolah Rendah Jenis Kebangsaan (C) Naam Kheung, Batu 3½ Jalan Cheras, Kuala Lumpur (referred to in the judgment as "NK School"). He joined the teaching service on January 1, 1953 first as a member of Unified Teaching Service. When this service was abolished upon the implementation of Abdul Aziz Salary Report (1971), on his option the respondent was accepted into the Government Teaching Service with effect from April 1, 1972 and was placed in the service as a Category B1 teacher. He thus, in the words of Encik Abdul Halim Shah bin Abdul Murad, an officer in the Ministry of Education which words are contained in his affidavit sworn on May 3, 1980, and agreed to by the respondent in his affidavit sworn on June 28, 1980, becomes "directable, deployable and transferable to perform teaching, administrative and other duties that may be reasonably required of him and also becomes subject to all Service Circulars, General Orders, Treasury Instructions and other rules and regulations applicable to members of the Public Service". The respondent has been teaching in NK School since January 11, 1965 and has been a category B1 teacher ever since he joined the Government Teaching service on April 1, 1972.

By letters dated December 31, 1979, July 9 and 12, 1980 Pengarah Pelajaran Wilayah Persekutuan (Appellant No. 1) informed the respondent that he